



December 20, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Lisa M. Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210–AC02; Retirement Security Rule: Definition of an Investment Advice Fiduciary and Related Exemptions.

Dear Assistant Secretary Gomez:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this letter to request an extension of the comment period for the Department of Labor, Employee Benefits Security Administration’s (EBSA) proposed expansion of the definition of “fiduciary” for purposes of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).¹ The proposed rulemaking would also amend the parallel regulation defining for purposes of Title II of ERISA, a “fiduciary” of a plan as defined in Internal Revenue Code section 4975.² EBSA concurrently proposed amendments to several administrative exemptions from the prohibited transaction rules that provide relief to investment advice fiduciaries, including Prohibited Transaction Exemption (PTE) 84–24 and PTE 2020–02.³

The proposed rulemaking will drastically expand the circumstances under which a professional is considered an investment advice fiduciary, to the extent that many instances of one-time advice will be subject to the fiduciary standard.⁴ At the same time, the regulation would narrow the availability of PTEs, particularly for professionals that recommend risk-management products such as insurance and annuities.⁵

¹ Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (Nov. 3, 2023).

² See *id.* at 75,890.

³ See *id.*

⁴ See *id.* at 75,901.

⁵ See *id.* at 75,913.

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed in this letter by Advocacy do not necessarily reflect the views of the SBA or the Administration. Advocacy performs outreach to obtain input from small business representatives about the impact of policy initiatives.

Request for Comment Period Extension

On November 3, 2023, EBSA published the proposed rule titled “Retirement Security Rule: Definition of an Investment Advice Fiduciary” in the *Federal Register*.⁶ This rulemaking will have a significant economic impact on a substantial number of small entities, as indicated by the initial regulatory flexibility analysis (IRFA) that EBSA prepared as required by section 603 of the Regulatory Flexibility Act (RFA).⁷ As noted in the IRFA, the proposed amendments would regulate industries primarily composed of small entities.⁸

The proposal seeks important information about the potential costs of the regulation to small entities. The small entities that will be required to comply with the regulation are in the best position to provide EBSA with information about the potential costs associated with the proposal. This information is crucial for determining the economic impact of the rule and for considering less costly alternatives as required by the RFA. Because of the importance of the information potentially available from small entities, Advocacy requests that the comment period be extended by at least 60 days.

On November 8, 2023, a group of 18 stakeholder trade associations submitted a joint letter outlining the challenges that the affected industries will face in providing meaningful comments by the current deadline of January 2, 2024.⁹ The letter notes that the proposed rule “makes significant and unanticipated changes to the current regulatory framework that will require significantly more time for meaningful analysis and comment, and to understand how [it] would impact access and choice for retirement savers.”¹⁰ The group requested a 60-day extension to the comment period to give “all interested stakeholders sufficient time to provide meaningful feedback[.]”¹¹ According to the trade associations, the request for an extension was subsequently denied.

⁶ 88 Fed. Reg. 75,890 (Nov. 3, 2023).

⁷ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁸ EBSA has estimated that the following percentages of affected entities are small: 97 percent of broker-dealers, 99 percent of registered investment advisers, 82 percent of insurance companies, 99 percent of independent producers, 93 percent of pension consultants that serve the retirement market, 97 percent of the investment company principal underwriters and investment company principal underwriters for IRAs, 76.5 percent of commercial banks, and 98 percent of mutual fund companies. In addition, 99% of captive insurance agents affected by the rulemaking work for small entities. 88 Fed. Reg. at 75,965-68.

⁹ Sec. Indus. & Fin. Mkts. Ass’n et al., Comment Letter Trades Request Additional Comment Time (Nov. 8, 2023), <https://www.regulations.gov/comment/EBSA-2023-0014-0054>.

¹⁰ *Id.*

¹¹ *Id.*

The Office of Advocacy supports the request for an extension of the comment period. Advocacy has consistently received input from small entity stakeholders that an extension is not only necessary but crucial to obtaining meaningful feedback on this proposed rulemaking. Small entities have told Advocacy that they lack the resources necessary to respond to such an extensive proposal within the current time frame. These stakeholders have expressed additional dismay that the comment period and deadline occur during a time typically unavailable for those observing November and December federal and religious holidays. These holidays reduce the work time available to analyze the complex changes made in the rulemaking and assess potential impacts. As such, small entities impacted by this rulemaking have been disadvantaged in the process.

These concerns were voiced by small entity representatives in requests to testify and during testimony at EBSA's December 12 and 13 public hearing on the regulation.¹² Extending the comment period by at least 60 days will provide crucial consideration to the challenges that small entities face and ensure that they have adequate time to provide comments given their limited resources and competing commitments. Obtaining meaningful comments from small entities is beneficial both to small entities and to EBSA in developing a strong and effective rule.

Thank you for your consideration. If you have any questions regarding this request or if Advocacy can be of any assistance, please do not hesitate to contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Meagan Singer
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

¹² Small entities have told Advocacy that holding the public hearing on this proposed rule prior to the end of the comment period has further limited their ability to perform thorough analysis of the proposal and provide useful feedback. U.S. Dep't of Lab., Emp. Benefits Sec. Admin., RETIREMENT SECURITY RULE: DEFINITION OF AN INVESTMENT ADVICE FIDUCIARY AND RELATED EXEMPTIONS PUBLIC HEARING, <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02-hearing> (last visited Dec. 19, 2023).

Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget